



BRB No. 15-0071

RANDOLPH BESSARD)	
)	
Claimant-Respondent)	
)	
TONY B. JOBE)	
(Former attorney for claimant))	
)	
Petitioner)	
)	
v.)	
)	
C & D PRODUCTION SPECIALIST)	DATE ISSUED: <u>Aug. 25, 2015</u>
COMPANY, INCORPORATED)	
)	
and)	
)	
LOUISIANA WORKERS')	
COMPENSATION CORPORATION)	
)	
Employer/Carrier)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney's Fees of David A. Duhon, District Director, United States Department of Labor.

Tony B. Jobe (Law Offices of Tony B. Jobe), Madisonville, Louisiana.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant's former counsel, Tony B. Jobe, appeals the Compensation Order Award of Attorney's Fees (OWCP No. 07-146789) of District Director David A. Duhon rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The fee award of the district director must be affirmed unless it is shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

Claimant sustained a work-related back injury in the course of his work for employer on a fixed platform in the Gulf of Mexico on November 21, 1997. Claimant retained Mr. Jobe (counsel) as his attorney, who represented him from June 1998 through April 14, 2014. On March 21, 2013, the administrative law judge issued a Decision and Order wherein, based on the stipulations of the private parties, claimant was awarded various periods of temporary total and partial disability benefits from December 23, 1997 through July 21, 2001, permanent total disability benefits from August 27, 2006 and continuing, and medical benefits arising from claimant's work-related back injury. Counsel subsequently filed a fee petition with the district director, who, on July 25, 2013, awarded counsel \$49,040 in attorney's fees, payable by employer pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b).¹

Claimant terminated his relationship with counsel effective April 14, 2014, and thereafter represented himself. By letter dated May 5, 2014, counsel for carrier submitted to the district director an application for a Section 8(i) settlement, 33 U.S.C. §908(i), which was approved by the district director on May 8, 2014. Pursuant to the settlement, employer agreed to pay claimant a lump sum of \$625,000 to discharge its liability under the Act. The agreement also recognized that counsel would file a fee petition with the district director for services he performed on claimant's behalf in 2013 and 2014, but it stated that employer would not be responsible for those fees.

Counsel, thereafter, filed with the district director an Application and Memorandum of Law in Support of a Lien on Benefits Awarded to Claimant seeking an attorney's fee under Section 28(c) of the Act, 33 U.S.C. §928(c). Counsel sought \$19,238.10, representing \$1,378.10 for attorney services performed in 2014 and paralegal

¹The administrative law judge, on June 13, 2013, issued a Supplemental Decision and Order awarding an attorney's fee to counsel, for work performed at the Office of Administrative Law Judges (OALJ) level, in the amount of \$16,132.50, payable by employer.

services performed between June 26, 2013 to April 12, 2014 at the district director level, \$11,940 for “uncompensated” work performed during periods between August 26, 2004 and August 23, 2012, when the case was before the administrative law judge, and a combined \$5,920 for “uncompensated” pre-controversion services performed between November 5, 2003 and August 24, 2004, as well as for work performed between November 1, 2003 through August 21, 2012, related to travel reimbursement and the removal of medical records from the administrative file under the Privacy Act.² On May 29, 2014, the district director informed counsel that he did not have the authority to award any attorney’s fee for work performed at the Office of Administrative Law Judges (OALJ) level, and that counsel could not recover any of the additional \$5,920 in fees requested for work performed between November 1, 2003 and August 21, 2012, as counsel’s entitlement to a fee for that period was resolved by the district director’s July 25, 2013 Order.³ The district director also advised claimant and the employer to respond to the request for \$1,378.10 in attorney’s fees that accrued after the July 25, 2013 Order. Counsel appealed the district director’s May 29, 2014 letter to the Board, which, by Order dated October 22, 2014, dismissed the appeal, on the ground that the district director’s letter was tantamount to a non-appealable interlocutory “order” because the district director had not addressed claimant’s liability for attorney’s fees.

On November 4, 2014, the district director issued an order awarding counsel an attorney’s fee totaling \$1,365, payable by claimant as a lien against his compensation, 33 U.S.C. §928(c). This fee is for work performed before the district director from June 26, 2013 to May 19, 2014. The district director again stated that he could not address counsel’s request for an attorney’s fee for work performed before the OALJ, nor could he reconsider any fees disallowed under the district director’s July 25, 2013 Order, as “that Order became final long ago.” Compensation Order at 2. The district director also disallowed \$13.10 in expenses on the ground that they are routine photocopy and facsimile charges which are considered part of normal office overhead.

²Counsel’s fee petition contained only an itemized statement regarding the \$1,378.10 sought for work performed before the district director primarily after March 21, 2014. His requests for a lien, pursuant to Section 28(c), of \$11,940 for uncompensated time before the OALJ and of \$5,920 for uncompensated time before the district director, are in the form of general statements contained in his Memorandum of Law. The services are itemized in counsel’s previous fee petition.

³The district director stated, incorrectly on the facts of this case, that counsel “cannot reurge that those fees not awarded should now be held as a lien on benefits paid to the claimant.” See discussion, *infra*.

On appeal, counsel challenges the district director's denial of an attorney's fee for work performed at the OALJ level and for those fees for which employer was not held liable in the July 25, 2013 Order, i.e., alleged pre-controversion fees and for time spent on Privacy Act and travel reimbursement issues. Counsel contends that the district director's prior order did not address claimant's potential liability for a fee for these services. The Director, Office of Workers' Compensation Programs (the Director), filed a response, accompanied by a motion to accept the brief, which was filed out of time. In his response brief, the Director urges the Board to affirm the district director's denial of the fee requested for work performed at the OALJ level, as well as the fee award of \$1,365, payable by claimant. The Director, however, urges the Board to vacate the district director's denial of the fee requested for work performed between November 2003 and August 2004, and for services rendered on the Privacy Act and travel reimbursement issues, previously denied pursuant to Section 28(b) by the district director's July 25, 2013 Order, and to remand the case for evaluation as to whether counsel is entitled to a fee for those services as a lien against claimant's compensation under Section 28(c). Counsel replies, urging the Board to reject the Director's brief as untimely filed.⁴ Counsel also moves for summary judgment and requests that the Board award him an attorney's fee and expenses under Section 28(c) as a lien on the proceeds of claimant's settlement in the amount of \$17,873.10.

We reject counsel's contention that the district director erred in failing to award him a fee for the legal services performed while this claim was before the OALJ. It is well-settled that a district director may award a fee only for the services performed for work at the district director level. *See Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*); *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980); *see also* 33 U.S.C. §928(c); 20 C.F.R. §702.132(a). We therefore affirm the district director's refusal to address counsel's fee petition for services rendered while the case was before the OALJ.

However, we agree with counsel and the Director that the district director erred in finding that his July 25, 2013 Order precluded his consideration of a fee request under Section 28(c). In his July 25, 2013 Order, the district director found that employer cannot be held liable under Section 28(a), (b) for work performed by counsel between November 2003 and August 2004, and on Privacy Act (6.5 hours of attorney time) and travel reimbursement (2.1 hours of attorney time) issues. If the employer cannot be held liable for an attorney's fee under Section 28(a) or (b), the claimant may be held liable under Section 28(c) for any necessary work performed on his behalf, as a lien on his

⁴The Board accepts the Director's response brief, which is accompanied by a motion to accept it out of time, as part of the record. 20 C.F.R. §§802.212, 802.217. Counsel's objection to this filing is rejected.

compensation award. 33 U.S.C. §928(c);⁵ 20 C.F.R. §702.132(a).⁶ Claimant's counsel, therefore, is entitled to seek an attorney's fee from claimant under Section 28(c), as it was established that employer cannot be liable for that fee under Section 28(a) or (b). *Simmons v. Huntington Ingalls, Inc.*, 48 BRBS 45 (2014), *aff'd sub nom. Albe v. Director, OWCP*, 600 F.App'x 252 (5th Cir. 2015); *Thompson v. Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 71 (2010); *Boe v. Dep't of the Navy/MWR*, 34 BRBS 108 (2000). In this regard, counsel properly notes that his fee petition was timely as to claimant's receipt of the Section 8(i) settlement proceeds. *See* n. 3, *supra*.

The district director's July 25, 2013 denial of an attorney's fee for the services at issue here was based on the application of Section 28(b). The district director did not address, in that 2013 Order, whether claimant could be liable for any attorney's fee under Section 28(c). Therefore, we remand the case for the district director to address claimant's liability for an attorney's fee as a lien on his compensation. *See Boe*, 34 BRBS 108. In particular, the district director should, in accordance with 20 C.F.R. §702.132, review counsel's fee petition to determine the necessity of the services provided and the reasonableness of the fee claimed. The district director also must consider claimant's financial ability to pay any attorney's fee pursuant to Section 28(c). *See Andrepont v. Murphy Exploration & Prod. Co.*, 41 BRBS 73 (Hall, J., concurring), *aff'g on recon.* 41 BRBS 1 (2007) (Hall, J., dissenting), *aff'd*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009).

⁵Section 28(c) states, in pertinent part:

An approved attorney's fee, in cases in which the obligation to pay the fee is upon the claimant, may be made a lien upon the compensation due under an award; and the deputy commissioner, Board, or court shall fix in the award approving the fee, such lien and manner of payment.

⁶Section 702.132(a) states, in pertinent part:

Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded, and when the fee is to be assessed against the claimant, shall also take into account the financial circumstances of the claimant.

Accordingly, the district director's award of an attorney's fee of \$1,365, payable under Section 28(c) as a lien against claimant's compensation, is affirmed. The district director's denial of an attorney's fee for work performed by counsel at the OALJ level and of \$13.10 in costs is affirmed.⁷ The case is remanded for the district director to address claimant's liability for an attorney's fee for any necessary work performed at that level for which counsel has not already been awarded an attorney's fee under Section 28(b).⁸

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

⁷We affirm the district director's denial of the \$13.10 charged as expenses for routine photocopying and facsimiles as he determined that they are a part of normal office overhead, and counsel has not specifically challenged this determination. *Cahill v. Int'l Terminal Operating Co., Inc.*, 14 BRBS 483 (1981); *see also Sans v. Todd Shipyard Corp.*, 19 BRBS 24 (1986); *Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984).

⁸Thus, counsel's motion for summary judgment is denied.